No. 11,364

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIEUTENANT COLONEL ERNEST H. GOULD, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California,

Appellant,

vs.

EDWARD A. DRAINER,

Appellee.

OPENING BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

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Subject Index

Table of Authorities Cited

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VS.
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OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below" discharging appellee from the custody of the appellant. (Tr. 48-53.) The Court below had jurisdiction of the habeas corpus proceedings under the provisions of Title 28 U.S.C.A., Sections 451 to 461 inclusive. Jurisdiction to review the order of the Court below is conferred upon this Court by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of appellant, Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Disciplinary Barracks, Camp Shoemaker, California. The facts which are undisputed reveal that appellee enlisted in the United States Marine Corps on August 8, 1940, at Des Moines, Iowa, for a period of four years. From there he was sent to the Marine Base at San Diego, California, for training, where, after serving one month, he deserted, being declared a deserter from the Marine Corps as of September 8, 1940. He then proceeded to return to his home at Morgantown, West Virginia, but after getting as far as Cedar Rapids, Iowa, he and a companion were arrested for breaking and entering a grocery store. For this offense he was sentenced to serve ten years in the Men's Reformatory in Iowa. However, he was released in the Fall of 1942, after having served approximately two years. On July 27, 1943, almost a year later, appellee enlisted in the United States Navy at Clarksburg, West Virginia, concealing his prior enlistment and desertion from the Marine Corps and giving his age as seventeen, in order to avoid the problem of not having a draft card.

On November 1, 1944, after fifteen months in the Navy, eight of which were served in the South Pacific area, appellee was given an honorable medical discharge from the Navy at the Philadelphia Navy Yard, Philadelphia. At the time of the issuance of this

discharge the Navy authorities were still unaware of his desertion from the Marine Corps.

On November 7, 1945, appellee was arrested by civilian authorities and returned to the Navy Base at Treasure Island, California, where he was tried by the Navy Court-martial for deserting the Marine Corps during the period September 8, 1940 to July 17, 1943. He was found guilty and sentenced to serve eighteen months imprisonment, at the conclusion of which he was to receive a dishonorable discharge from the service. Immediately thereafter he was transferred to Camp Shoemaker, California, into the custody of the appellant. Appellee then petitioned the Court below for a writ of habeas corpus, claiming that the naval authorities and naval court had no jurisdiction over him since he had been honorably discharged from that service on November 1, 1944. The Court below, which heard the cause, sustained appellee's contention, ordered him released from custody and entered the following memorandum opinion:

> "Roche, District Judge: This is an application for writ of habeas corpus whereby the petitioner, Edward A. Drainer, seeks to be released from imprisonment by the United States Naval Authorities. The imprisonment is pursuant to sentence by General Court Martial on the charge of desertion from the U. S. Naval Service. In his petition Drainer alleges lack of jurisdiction on the ground that at the time of his arrest by civilian authorities and trial he had been separated from the military service by an honorable dis-

charge and further, that the prosecution was barred by the two year statute of limitations. The record discloses the following facts:

On August 8, 1940, Drainer, then 18 years old, enlisted in the U. S. Marine Corps at Des Moines, Iowa, for a period of four years. He was sent to San Diego, California, for training and after serving one month he absented himself without leave. He was thereupon declared a deserter as of September 8, 1940.

It appears from his testimony before the Court Martial Board that he left because he was homesick and wanted to return to his home in West Virginia; that he got as far as Cedar Rapids, Iowa, by riding freight trains; that he was hungry and without funds; that in order to get food he and his companion broke the window of a grocery store, that they were arrested, charged with breaking and entering and sentenced to the reformatory, from which Drainer was released after serving two years. He further testified that after his release he spent several months in Sacramento, California, and then visited his family in West Virginia. By this time the United States was at war and the petitioner, who had left his country's service in time of peace, was anxious to return.

Accordingly, on July 27, 1943, the petitioner, now being 21 years of age, voluntarily enlisted in the U. S. Navy at Clarksburg, West Virginia. In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service.

While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.

On November 1, 1944, after almost a year and a half of honorable service, eight months of which was spent overseas in the South Pacific Area, petitioner was given an Honorable Medical Discharge from the U. S. Naval Service.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. Naval Service during the period from September 8, 1940, to July 27, 1943. He was sentenced to eighteen months imprisonment at the conclusion of which he shall receive a Dishonorable Discharge from the United States Naval Service.

The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to his receipt of an Honorable Discharge.

It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. U. S. v. McDonald, 265 Fed. 695; Naval Courts and Boards, Section 334 at page 92; Winthrop, Military Law and Precedents, 2nd Ed. (1920) at page 89. And once honorably discharged, such Honorable Discharge is a 'formal, final judgment passed by the government upon the entire military record' of the person. U. S. v. Kelly, 82 U. S. 36.

That an Honorable Discharge from the U. S. Naval Service would not be a 'formal, final judg-

ment' upon the person's service record with the Army is, of course, true. They are two separate and distinct branches of the military service, each with its own Secretary as administrative head. The U. S. Marine Corps, however, is not a separate branch of the service. It is a part of the Navy and is, by statute, made subject to the laws and regulations of the U. S. Navy. 34 U.S.C.A. 715. In U. S. v. Dunn, 120 U. S. 249, the Supreme Court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating his longevity pay.

It will be noted that the petitioner was not charged with desertion from the Marine Corps. He was charged with desertion from the U. S. Naval Service. On July 27, 1943, he enlisted in the U. S. Naval Service. On November 1, 1944, he was honorably discharged from the U. S. Naval Service.

If respondent's contention that the Marine Corps is a separate branch of the service is correct, then the Court Martial Board had no jurisdiction to try petitioner on a charge of desertion from the U. S. Naval Service. If respondent's contention is not correct, prosecution for desertion from the U. S. Naval Service after petitioner had received an Honorable Discharge from the U. S. Naval Service is barred by such Honorable Discharge.

In support of his contention the respondent relies primarily on the decisions of the Judge Advocate General, citing Melling's 'Law Relating

to the Navy', and argues that an administration interpretation of the statute is entitled to great weight in the courts. This is true, but an interpretation that is not required by the statute itself nor supported by judicial decision fails to carry the same weight. Such an interpretation is not binding on the Court.

Wherefore, the petition for a writ of habeas corpus will be granted and the petitioner will be discharged; but pending an appeal from the decision of this court he shall be enlarged upon recognizance with surety in the sum of $100.00 for appearance to answer the judgment of the appellate court, in accordance with Rule 29 of the Rules of Court for the Ninth Circuit.

Dated: April 16, 1946." (Tr. 48-52.)

From the order discharging the appellee from his custody the appellant appeals to this Honorable Court. (Tr. 53.)

CONTENTIONS OF APPELLANT.

The five points designated by the appellant as the grounds to be relied on by him on appeal are as follows:

"(1) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable Michael J. Roche, United States District Judge for the Northern

District of California, erred when he ordered the appellee discharged from the custody of the appellant;

(3) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have held that a deserter from the United States Marine Corps, who fraudulently enlists in the United States Navy, is amenable to prosecution for his desertion from the United States Marine Corps;

(4) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred in holding that the United States Naval authorities and Naval Court had no jurisdiction over the person of the appellee;

(5) That the sentence imposed against the appellee by the General Court Martial convened at the Naval Training Station and Distribution Center, San Francisco, California, on January 5, 1946, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant." (Tr. 56, 57.)

QUESTION PRESENTED.

Is a deserter from the Marine Corps, who fraudulently enlists in the Navy and receives an honorable discharge therefrom, amenable to prosecution for his desertion from the Marine Corps?

ARGUMENT.

From the memorandum opinion filed by the Court below, it appears that its ruling was based primarily on the decision in the case of

United States v. Kelly, 82 U. S. 34,

which holds that

> "An honorable discharge is a formal final judgment passed by the Government upon the entire military record" of the person.

Appellant respectfully asserts that he does not believe the *Kelly* case is applicable. In that case Kelly deserted while serving in the United States Army but returned and was restored to duty by order of his Department Commander, without trial, on condition that he make good the time lost (about two months). Kelly complied with the condition and was honorably discharged at the expiration of his term of service. Subsequently Kelly claimed to be entitled to bounty money but the claim was denied by the Pay Department because of the charge of desertion on his service record. Kelly brought an action in the Court of Claims and that Court ruled that he was entitled to the money. The Government appealed. In its opinion the Supreme Court stated:

> "We do not think that under the circumstances of the present case the bounty was forfeited. The able lawyer who fills at present the post of Judge Advocate General, in a case similar to the present, held that 'the honorable discharge of the deserter was a formal final judgment passed by the Government upon the entire military record of the soldier and an authoritative declaration by

> it that he had left the service in a status of honor.' That as such it dispensed altogether with the supposed necessity that the soldier must obtain bounty by removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving bounty. With this opinion we entirely concur."

As seen by the foregoing and our several important distinctions between the *Kelly* case and the instant one, the principal question presented in the *Kelly* case was whether a soldier who fulfilled the terms of a single enlistment was entitled to bounty money. There was no fraud or deception on the part of Kelly. On the contrary, the Army authorities were fully cognizant of his desertion when they permitted him to return to duty and serve out the remainder of his enlistment. That this is accepted military procedure where there is a single enlistment, is shown by the following excerpt from Winthrop's Military Law and Precedents, Second Edition, Vols. 1 and 2, page 651:

> "It is declared by par. 127, Army Regulations, that a deserter, when returned to the proper command to make good the time due by him to the United States, 'will be considered as again in service'. While thus serving he will occupy in his military relations the same status as that of any soldier in good standing, except in so far as his rights to pay or allowances may have been divested by a forfeiture of pay, etc., 'to become due,' contained in his sentence. Otherwise he is to be paid, subsisted, etc., as well as treated in general, like any other soldier. He is

> not in arrest, and is not to be discriminated against because of having been a deserter. His discharge at the end of his service will be an honorable one in law, though it may properly state the circumstances under which it is given."

But in the instant case the petitioner wilfully and purposely concealed his prior enlistment and desertion from the Marine Corps when he enlisted in the Navy. Had the Navy authorities been informed of the true facts, it is certain that they would not have permitted him to enlist but would have turned him over to the Marine Corps for proper disciplinary action. The suppression of the true facts constituted a fraud upon the Government. It follows that he should not be permitted to benefit by his own fraud.

In re Grimley, 137 U. S. 147.

Furthermore in the *Kelly* case there was but a single enlistment from which an honorable discharge was received, while in the instant case there are two separate and distinct enlistments, only one of which has been terminated. An enlistment is essentially a contract. In discussing the contractual relationship created by enlistment in the armed forces the Court in *In re Grimley, supra,* stated:

> "This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications

* * * Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the law of contracts. * * * But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. * * * In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. * * * By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a solider is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into new relations with him or permitted him to change his status. * * * No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not ablebodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States."

Concerning the reenlisting of a soldier in the same branch of the service without having obtained a discharge from a prior enlistment, *Winthrop's Military Law and Precedents,* Second Edition, Vols. 1 and 2, has this to say on pages 652 and 653:

> "REENLISTING WITHOUT A REGULAR DISCHARGE. Art. 4, as has been seen, prescribes in what manner and form a soldier shall be discharged, and the present Article in effect declares that a soldier who assumes to discharge HIMSELF from his proper regiment, etc., i. e. to leave it 'without a regular discharge', and enlist in another, does so at the peril of being treated as a deserter. It is to be construed, however, not as creating an offense distinct from the desertion made punishable by Art. 47, but as indicating a specific form of such offense, or rather as declaring that the act of reenlisting under the circumstances described shall constitute PROOF OF DESERTION on the part of the soldier. The object of the provision evidently was to preclude the notion that a soldier could be relieved from liability to reenter the service in another, or in other words, that he could be excused from repudiating his pending contract by substituting another in its place."

In the memorandum opinion filed in this case the Court below acknowledges that an honorable discharge from the United States Naval Service would not be a "formal final judgment" upon the person's service record with the Army but states that this does not apply to the instant case since the United States Marine Corps is not a separate branch of the service

but is a part of the Navy. Actually the Marine Corps occupies a position intermediate in some respects between the Army and Navy and to some extent is an independent organization.

In re Doyle, 18 Fed. 369.

In *Walton v. United States,* 31 Ct. Cl. 196, 200, the Court held that

> "The Marine Corps, though a distinct organization from the Army or Navy, is nevertheless subject to the laws and regulations for the government of the Navy 'except when detached for service with the Army, by order of the President' in which case they shall be subject to the rules and Articles of War prescribed for the government of the Army".

In 19 *Op. Atty. Gen.* 618, it is stated

> "The military establishment of the United States consists of three principal organizations, the Army, the Navy and the Marine Corps. Each has an organization distinct from that of the others, as plainly appears in the Revised Statutes and each is the object of a distinct annual appropriation by Congress".

On several occasions Congress has acknowledged the fact that the receipt of an honorable discharge does not automatically cancel a charge of desertion pending against a member of the Navy or Marine Corps, and in those instances where it was believed justifiable has deemed it necessary to reenact legislation to have this accomplished. Thus, the first session of the 50th Congress enacted a Bill which under certain conditions authorized the Secretary of the Navy to remove the

charge of desertion standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served during the Civil War.

See

Sections 1012 to 1014, Title 34 *U.S.C.A.*

For similar sections pertaining to the Army see

Sections 1434 to 1441 inc. of Title 10 *U.S.C.A.*

In approving the adoption of this Bill, the Committee on Naval Affairs embodied in its report the following quotation from the report of the Committee on Military Affairs of the 47th Congress:

> "* * * The second section of the proposed substitute is intended by your Committee to relieve another class of soldiers who, having absented themselves from their commands, or deserted, after such desertion or absence without leave, voluntarily returned to their commands, and were either tried by court martial and punished and restored to the rolls of their commands, or were restored without punishment, and who served afterwards until regularly mustered out of the service and received a regular certificate of discharge. * * * In such cases your Committee are of the opinion that the charge of desertion should be removed, and that in all cases where a soldier absented himself from his command and voluntarily returned to the same, and paid the penalty of such offense, or the offense was not sufficient to require any punishment, and then served until regularly mustered out and received regular discharge, should have the charge of desertion removed."

See

Page 1035, *Congressional Record,* 50th Congress, 1st Sess. February 7, 1888.

A similar bill was enacted by the 68th Congress, 2nd Sess., authorizing the President to remove the charge of desertion from the records of members of the Navy and Marine Corps who served during the First World War. See

Section 1017, Title 34 *U.S.C.A.*

Speaking against an amendment to this bill proposed by Congressman Huddleston of Alabama, which would make eligible to compensation under the Compensation Acts those who served honorably during the First World War and who were honorably discharged and subsequently enlisted and deserted, Congressman Butler, who introduced the bill, stated:

> "I could not agree with my friend from Alabama that for all time to come we should excuse these military men of the charge of desertion because they happened to have military service. We thought this Congress would be generous by taking this blemish from their records. But I have never heard it suggested that for all time in the future men who commit desertion may be forgiven automatically without the intervention of the authority of Congress simply because of the fact they had service in the World War. * * * Mr. Chairman I will ask the committee not to adopt the amendment of my friend. It is new to me. But if I thought about it for a week I do not think I could agree to adopt an amendment that for all time to come would excuse the offense of desertion."

See

Page 415, *Congressional Record,* 68th Congress, 2nd Sess., December 10, 1924.

Furthermore Congress provided a different law for enlistments in the Navy and Marine Corps.

Section 181, Title 34 *U.S.C.A.*

relates to enlistments in the Navy while

Section 692, Title 34 *U.S.C.A.*

provides for enlistments in the Marine Corps.

Section 1011, Title 34 *U.S.C.A.*

provides for the arrest of deserters from the Navy or Marine Corps.

In

Section 183, Title 34 *U.S.C.A.*

it is stated as follows:

> "An enlistment in the Navy or Marine Corps shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct".

Thus it is clear that Congress intended the Navy and Marine Corps to be separate branches of the service in regard to enlistments and desertions. And enlistment in the Navy after a desertion from the Marine Corps is not a return to the Marine Corps, and a discharge from one branch of the service cannot be applied to the other service, even though the Secretary of the Navy is authorized to grant honorable discharges "to all enlisted persons in the Navy".

Sections 192, 193, Title 34 *U.S.C.A.*

Such honorable discharges are granted "according to a form prescribed by the Secretary of the Navy". The Secretary of the Navy has designated different forms for the Navy and the Marine Corps.

It should be borne in mind that the decision of the Court-martial on the question of its jurisdiction was based upon

Melling's "Laws Relating to the Navy", Sec. 1426, page 567,

which provides as follows:

> "A discharge from the Navy operates in bar of trial for a previous desertion from the Navy, but not in bar of a previous offense committed in the Marine Corps. They are distinct branches of the service, and a discharge from the former does not operate as a discharge from the latter. (File 26251-5810:1, Feb. 20, 1912.)"

It is well settled that an administrative interpretation of a statute is entitled to great weight in the Court.

Brown, Adm'x. v. U. S., 113 U. S. 568, 28 L. Ed. 1079, 5 S. Ct. 648;

Stout v. Hancock (C.C.A.-4), 146 F. (2d) 741.

CONCLUSION.

In the case at bar the accused made a contract with the Government by enlisting in the Marine Corps and now urges, as a defense, a matter unrelated to the contract, to-wit: an honorable discharge obtained pursuant to a subsequent fraudulent enlistment. The

danger inherent in permitting members of the military service to escape punishment for desertion, is apparent. As we have recently witnessed, the chaos and confusion attendant with the declaration of war and the enlistment of millions of men into the services make it practically impossible to trace and apprehend all deserters. If the ruling of the Court below in the instant case is permitted to stand, a deserter can escape punishment for his offense by the simple expedient of concealing himself for a reasonable length of time and then enlisting in the same branch of the service. The subsequent receipt of an honorable discharge would make him immune from punishment. The appellant respectfully asserts that he does not believe such a ruling is in accord with the intent of Congress nor conformable to present laws. Accordingly the decision of the Court below ordering the discharge of the appellee from the custody of the appellant was improper and should therefore be reversed.

Dated, San Francisco, California,
October 16, 1946.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellant.